In the United States
Circuit Court of Appeals
For the Ninth Circuit

No. 5498

NATIONAL SURETY COMPANY, a corporation,
Appellant.

v.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Appellant's Reply Brief

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Appellant's Reply Brief

I.

At p. 4 of its brief the Government attempts to meet the point made by appellant, at p. 17 of its opening brief, that, "The bond proved is conditioned differently than the bond alleged."

The Government's argument is that the unauthorized addition of the words "term to term" and "present term," is immaterial and therefore the variance is immaterial.

The Government has mistaken the point made here. The argument here advanced is not in relation to the words "term to term," but was that the writ alleges that the bond is conditioned for appearance "during the *May,* 1926, term, and time to time thereafter." The bond offered (Tr. 26) is for appearance "on the ..... day of the present term, 1925," and is dated February 27th, 1925. The "present term" would therefore be the November, 1924, term.

Our point is that it is a fatal variance to allege a bond for appearance in May, 1926, and to prove a bond for appearance in November, 1924. This is too great a discrepancy in time.

No amendment was asked to change this variance.

II.

The Government offers no answer to the point made by us at p. 17, that the bond was to answer "a charge *exhibited* against the said defendant," whereas no charge had been "exhibited."

III.

At p. 6 the Government attempts to answer the point made that there was no proof that "the defend-

ant was duly called but came not." The Government contends (p. 6) that reading into evidence lines from the clerk's docket (Tr. 22) "entered order forfeiting bail and for bench warrant," is sufficient proof (1) that the defendant was called, and (2) that the defendant failed to appear.

(a) The docket entry itself is not proof of anything. The *clerk's minutes* might be, but not the docket.

(b) To support its contention that the judgment of forfeiture is conclusive and cannot be impeached, the Government cites several old and isolated decisions of *inferior* courts. *But* wholly refuses to comment upon the *Federal cases* cited in the opening brief, holding squarely that proof of the calling of the defendant, and his failure to appear is most essential and must be made. Many other cases of high state courts were cited by appellant, but ignored by the Government.

REASONS FOR THE RULE—ABSURD RESULT OF GOVERNMENT'S CONTENTION:

1. The Government vigorously contends that it is not necessary to call the surety or give it any notice whatosever of the forfeiture, *and* that the defendant may be called at any time—even several years after the date of the bond (as here); *and,* that the *ex parte*

forfeiture made and entered is then binding and conclusive and cannot be impeached.

If this were true, then we would have the absurd result that the Government could go in at any time, on *ex parte* motion, and without notice to a surety, and have a minute entry of forfeiture made, which would be conclusive forever against the surety.

What if the defendant was never in fact called? What if defendant was called before the date for his appearance? What if defendant actually appeared and by mistake the entry was made? What if defendant appeared a few minutes after the forfeiture entry was made, and pleaded guilty and was sentenced?

Can it rationally be contended that the minute entry in such cases is conclusive and proves itself?

Clearly, if the surety has no right to be called and protest the entry of a forfeiture *nisi*—then it cannot be binding and conclusive against him.

The Federal cases cited in appellant's brief are squarely against this absurd proposition.

(c) *Foundation of the rule—rule not here applicable*:

The rule that the judgment imports absolute verity, if at all applicable here, is based upon the proposition prohibiting collateral attack. In such cases a judg-

ment must be produced which shows on its face by proper recital that the court had jurisdiction, and which shows the jurisdictional facts upon which it is founded.

But here there is no recital that the defendant was called, nor that he failed to appear. If these facts were recited it might be that the judgment *nisi* would be conclusive.

(d) This minute entry does not rise to the dignity of a judgment. It is only a minute entry. The rule of absolute verity was never intended to apply to minute entries.

(e) At pages 8 and 9 the Government cites two Washington statutes which provide that the bond shall not fail for want of form. From this the Government concludes that *proof of default* in an action on the bond is not necessary. This is a *non sequitur*. A statute providing that the bond shall not fail for want of form or recitals, does not obviate nor affirmatively furnish proof of a default.

IV.

At pp. 9-12 the Government attempts to avoid the point made by appellant (pp. 21-24) that there was no proof of the judgment.

The case of *Southern Surety v. U. S.*, 23 Fed. 2nd. 55, cited by the Government, is utterly foreign to the

subject. The Government refuses to comment upon the Federal cases cited by appellant, holding that this minute entry is insufficient.

Moreover, there was no judgment properly proved. The Government read from the docket the entry "entered order forfeiting bail and for bench warrant." The clerk's minutes, not the docket entry, is the only competent proof.

In the Federal cases cited by appellant it was held that the Government must produce the "records and files and the facts in question cannot be otherwise proven."

V.

At p. 12 the Government contends that it was not necessary to call the surety to produce the defendant, and cites *Southern Surety Co. v. U. S.,* 23 Fed. 2nd. 55. But in that case the point was not raised, because, as stated at p. 57, the court states that the surety was there in fact called.

VI.

At pp. 13 and 14 the Government attempts to meet our point that there was a material unauthorized alteration of the bond, after execution.

The Government does not deny that this unauthorized alteration (described pp. 24-27 of opening

brief) was made. They contend, however, that the addition of the words "term to term" and "present term" are not material. In view of the many Federal cases cited (pp. 30-31 opening brief) to the effect that these words are material and essential, it can not be held that they are not material. If such an array of authority can be produced to show their vital effect on a bond, they must be material. They may not be controlling, but they were material.

It cannot be said that one may alter a formal written instrument and then hold the other party to abide by a very close question as to the legal effect of the words added to the instrument.

VII.

At pp. 14 to 16 the Government attempts to answer our point (p. 27) that "the bond is void because no time is stated for appearance." The bond here, before alteration, fixed no time for appearance. It was conditioned for appearance on the ..... day of the ..... term of the Court to be held in Seattle on the ..... of 1925.

The case of *U. S. v. Duke,* 5 Fed. 2nd, decided by Judge Neterer, is cited as controlling. In that case, however, it will be found that the bond fixed a day certain (see bond p. 825, where it is stated "the 1st

day of February, 1924"). The bond in the *Duke* case did not mention the term, but did mention the day. There was, thus, a day certain fixed. But here there was no day, no month, or term—nor anything from which they could be determined. In the *Duke* case, the day being fixed, the term follows as a matter of law.

VIII.

At pp. 16 and 17 the Government attempts to answer our point (pp. 29-34) that "the defendant was not called at any time covered by the bond."

It will be remembered that the defendant was not called until nearly two years after the giving of the bond. If the bond covered any time it was the "present term, 1925." The bond being dated February 27, 1925, the present term would be the November, 1924, term.

The Government then makes the contention that "under the Washington statutes the defendant was bound to appear at all times until discharged." Here, we have advanced the bald proposition that the Government can wait any length of time to call the defendant. If two years, as in the instant case, then why not ten years? This is utterly unreasonable and can not be the law.

IX.

At pp. 18 and 19 the Government contends that the surety is bound under the Washington statutes, and that though these statutes require the information to be filed in thirty days (here the bond was given February, 1925, information filed September 30, 1926) and further require a prosecution in sixty days, that nevertheless the surety can be held.

In other words, the Government insists that the Washington statutes requiring the bond to cover appearance at any date, is controlling. *But* refuses to read in connection with that statute the related statute requiring the filing of a charge within thirty days and the prosecution in sixty days.

The Government would take advantage of the favorable statutes, but ignore the unfavorable.

It is only fair to assume that the broad Washington statutes governing time for appearance would never have been passed without the other statute, placing a limit upon the right to the prosecutor to indefinitely hold a defendant under a charge.

The Washington cases cited hold squarely that the thirty and sixty day statute inure to the benefit of the surety.

In *State v. Lewis,* 35 Wash. 261, 77 Pac. 198, it was said at p. 268:

> "When it shall have been determined that such right to discharge and dismissal exist in defendant's behalf, it would seem logically to follow that this right inures to the advantage of the sureties on the defendant's bail bond."

Counsel for the Government say that the Washington decisions cited are not controlling, because in each of them the criminal case was actually dismissed. But, they fail to observe that in *State v. Lewis,* which holds that the benefit of the thirty and sixty day statutes inure to the surety, the action on the forfeiture was made before the criminal case was in fact dismissed. The Supreme Court of Washington there held that even though the criminal charge had not been dismissed at the time the forfeiture was made, that nevertheless the surety could claim the benefit of the thirty and sixty day statutes.

X.

At p. 22 the Government attempts to meet our point (pp. 40-41) that "the sureties were relieved because the information charges a different crime than that set forth in the bond."

The Government, in its argument, overlooks and fails to meet the fact that if the bond covered any offense by any name, that nevertheless it did not require the surety to produce the defendant to answer *two* offenses such as were here brought against defend-

ant. It is not a question of similar offense, but a case of charging more than one offense.

XI.

Counsel for the Government contend that appellant has waived its right to have this court consider the insufficiency of the evidence to support the judgment, for the reason that appellant introduced evidence after its motion for a non-suit was denied and failed to renew its motion at the end of the case. In support of this contention are cited four cases:

American R. R. Co. of Porto Rico v. Santiego, 9 Fed. (2nd) 753;

Bunker Hill Mining etc. Co. v. Polak, 7 Fed. (2nd) 583;

Columbia and Puget Sound R. R. Co. v. Hawthorne, 144 U. S. 202;

Gilson v. F. S. Royster Guano Co., 1 Fed. (2nd) 82.

We admit that the general rule announced in these cases is applicable under certain circumstances. But we most urgently call the court's attention to the fact that this general rule is not an absolute and arbitrary one. It is subject to exception; and the case presented in this appeal falls clearly within all of these exceptions.

It might be well first to consider the reason for the general rule. The principles underlying it are

aptly stated in *Lancaster v. Foster,* 260 Fed. 5, at p. 6, as follows:

> "In behalf of the defendants in error it is contended that the first mentioned exception can not be availed of by the plaintiff in error because the latter thereafter introduced other evidence. A number of decisions are cited which indicate the existence of a rule to that effect. There is obviously good reason to support such a rule, where the record does not disclose the subsequently introduced evidence, or where that evidence is disclosed and it is such as to make the evidence as a whole enough to justify its submission to the jury. If the subsequently introduced evidence is not disclosed to the appellate court, it may be presumed that the plaintiff's case was strengthened by it, and that the evidence as a whole was such that an instruction to find for the defendant could not properly have been given. If any deficiency in the evidence offered by plaintiff is shown, or is to be presumed to have been supplied by the evidence offered by the defendant, the latter is in no position to complain of the court's refusal to direct a verdict in its favor. Such a position was presented in the case of *Grand Truck R. Co. v. Cummings,* 106 U. S. 700, 1 Sup. Ct. 493, 27 L. Ed. 66. The bill of exceptions in that case did not show the evidence introduced by the defendant after the overruling of its motion, that a verdict in its favor be directed. It was held that under such circumstances it must be presumed that when the case was closed on both sides there was enough testimony to make it proper to leave the issues to be settled by the jury. There is no room for such a presumption where all the evidence adduced on both sides is contained in the bill of exceptions, and neither the part of it which was before the court when it refused to direct a ver-

dict for the defendant, nor all the evidence on both sides was enough to make it proper to leave the issues to be settled by the jury.

"The evidence introduced by the defendants in the instant case had no tendency to support the claim asserted by the plaintiff, or to supply any deficiency in the evidence offered by the latter. If it was error to overrule the motion for a directed verdict when it was first made, nothing afterwards occurred to cure that error. * * * * We do not think the rule invoked is applicable where it is affirmatively made to appear that there is an absence of any good reason for applying it."

It will be readily seen that a general rule based upon such a theory must necessarily have exceptions, and cannot be arbitrarily exercised in every case. The court has so decided. In fact, this court, in the case of *Alaska Fishermen's Packing Co. v. Chin Quong,* 202 Fed. 710, recognizes such an exception. In holding that in the particular case before the court the failure to renew was fatal, Judge Gilbert said, at p. 710:

"Error is assigned to the denial of the defendant's motion for a non-suit as to the first cause of action made at the close of the plaintiff's testimony. The assignment of error is of no avail to the defendant in this court, for the reason that, after the motion for a non-suit was overruled, the defendant proceeded to take testimony upon the issues involved in said cause of action, including evidence tending to show that plaintiff had not performed the contract, and did not, at the close of all the testimony, request the court to instruct the jury to return a verdict in its favor. *The case is unlike Lydia Cotton Mills v. Prairie Cot-*

> *ton Co.,* 156 Fed. 225, 8 CCA. 129, in which the court held that error might be assigned to the overruling of a motion for a non-suit made at the close of plaintiff's evidence, on the ground that there was no issue of fact for submission to the jury, notwithstanding that the defendant thereafter took testimony, and did not renew the motion at the conclusion of all the evidence. *In that case the motion was based solely upon a proposition of law, and no issue or question of fact was involved, and the defendant's evidence had, and could have, no bearing upon it."*

It is appellant's contention that this appeal comes squarely within this exception. Here there was no controverted question of fact for submission to a jury; there was nothing but a cold proposition of law, presented to the court. Furthermore, the defendant's evidence had, and could have, no bearing upon plaintiff's case. The complete record is before this court on review, from which it is clearly apparent that the evidence introduced by appellant could in no conceivable way bolster up plaintiff's case, the weakness of which remained precisely as it was before defendant's evidence was put in. No possible interpretation can be placed upon the record to warrant a finding that defendant at any time waived its motion for a nonsuit. Under these circumstances, then, the general rule does not apply.

A case directly in point on the contention we are making is *Citizens Trust & Savings Bank v. Falligan,*

4 Fed. (2nd) 481, heard in this court on April 6, 1925. Judge Gilbert, in accordance with his comment on the *Alaska Fishermen's* case, *supra,* discusses our point as follows:

> "The bank assigned error to the denial of its motion for a non-suit made at the close of the plaintiff's testimony. The ground of the motion was that there was no evidence to show that the bank participated in, or was a party to, the fraud. *The defendant in error contends that the bank waived its motion by its failure to request a peremptory instruction in its favor at the close of all the testimony. After the denial of the bank's motion, Barry testified in his own behalf; but the bank offered no further testimony and stood upon its motion.* The defendant in error cites cases holding that a motion for non-suit is waived where not renewed in a case where testimony is thereafter taken by the party so moving. In *Columbia Railroad Co. v. Hawthorne,* 144 U. S. 202, it was held that the refusal to direct a verdict for the defendant at the close of the plaintiff's evidence, when the defendant has not rested his case cannot be assigned as error. *It is true that the defendant bank in the present case at no time formally announced that it rested. But that circumstance is deemed of no importance. The controlling fact is that it did not waive its motion. Kinnear Mfg. Co. v. Carlisle,* 152 Fed. 933.
>
> "The question, therefore, is properly before us, whether or not there was evidence to go to the jury on the question of the bank's complicity in the fraud which was practiced upon the plaintiff."

It is to be noted that this opinion was in a case

tried to a jury. The case at bar presents a much stronger exception. Here was a clear proposition of law with no controverted question of fact, triable to the court, and the evidence defendant put in could in no wise affect plaintiff's case.

Another case squarely in point is *Lydia Cotton Mills v. Prairie Cotton Co.,* 156 Fed. 225. It is there stated, beginning at p. 233:

> "The testimony of the witnesses offered by the defendant in the case now under consideration in no way affects that offered by the plaintiff. * * * * We do not think that the rule of practice laid down in *Grand Trunk Ry. Co. v. Cummings,* and in *Insurance Co. v. Crandall,* above cited, applies in the case before us. The principle in our case is that there was no issue of fact for the jury at all, upon any of the evidence, or upon all of the evidence. The question was one solely for the court—the construction of a written contract, plain in its terms * * * *. The construction of the contract as set forth above in this opinion being for the court, there was no issue of fact for the jury. In all of the cases we have examined on the point we are now discussing, there was some evidence relating to the fact at issue, and the rule was laid down that if the defendant failed, after introducing testimony, to renew the motion to direct a verdict made at the close of plaintiff's case, the refusal of the trial court to grant the motion could not be assigned as error * * * *.
>
> "The motion of defendant was based solely upon a proposition of law, and no issue or question of fact was involved. We do not think, therefore, that any question in regard to the rule of practice referred to arises."

It is noted that in this case, as in the case at bar, "there was no issue of fact involved upon any of the evidence or upon all of the evidence. The question was one solely for the court—the construction of a written contract plain in its terms." It is to be noted further that this very case is the one referred to by Judge Gilbert in his opinion in the *Alaska Fishermen's* case, *supra,* as being an exception to the general rule.

The latest case in point is that of *American State Bank v. Mueller Grain Co.,* 15 Fed. (2nd) 899, in which it is said:

> "There was a motion for a directed verdict at the close of plaintiff's evidence. That, if not waived by subsequently calling the witness Steinert for the defendant, is available here. We are of opinion that it was not waived * * * *.
>
> "In *Grand Trunk Ry. Co. v. Cummings,* 106 U. S. 700, speaking of a motion made by defendant at the close of plaintiff's testimony, the court said: 'If he goes on with his defense and puts in testimony of his own, and the jury, under proper instructions, finds against him on the whole evidence, the judgment cannot be reversed, *in the absence of the defendant's testimony* on account of the original refusal, even though it would not have been wrong to give the instruction at the time it was asked.'
>
> "In *Lydia Cotton Mills v. Prairie Cotton Co.,* 156 Fed. 225, the court said: 'The reason for the principle laid down in the case last cited (*Grand Trunk*) is readily apparent, that, although the

testimony offered by plaintiff may not in itself have been sufficient to warrant a verdict, yet the court was entitled to see what effect the testimony of defendant subsequently offered may have had upon the issues involved. For, it frequently occurs in the trial of causes that the testimony of the defendant upon cross examination of witnesses, or disclosures otherwise made, has a tendency to strengthen rather than weaken plaintiff's case. It was, therefore, important that the defendant's testimony should be set out in the record, that the court might see and determine upon all of the testimony, as to whether or not the case should have gone to the jury.'

"The court held that the defendant might have assigned for error the overruling of a motion to dismiss, made at the close of plaintiff's evidence under the circumstances there shown. In *Lancaster v. Foster,* 260 Fed. 5, the court held that an exception to denial of the motion for a requested verdict made at the close of plaintiff's case, is not waived by defendant by subsequent introduction of evidence, where such evidence is all in the record, and contains nothing which strengthens plaintiff's case. Petition for certiorari was denied in that case."

These cases, and not the cases in appellee's brief, set forth the law applicable on this appeal. Each of the cases cited by counsel for the Government applies the general rule to a case falling within the scope of that rule—a case where there is an issue of fact, and not solely a proposition of law—a case where the defendant's evidence was not before the court on appeal—or a case where the evidence offered by defend-

ant affected plaintiff's case. Such cases are no authority for the case at bar.

We submit that defendant's motion for a non-suit was not waived; that there was no issuable question of fact involved; that the sole question was one of law; that with or without defendant's evidence it remained the same; that the question of the sufficiency of the evidence to sustain the judgment entered below is properly reviewable by this Honorable Court.

XI.

At p. 24 the Government contends that no proper exceptions were taken to the findings made by the court, and embodied in the judgment. An exception was taken to the judgment.

The assertion of this claim almost approaches bad faith on the part of the Government.

Neither counsel for the Government, nor for appellant, ever intended or attempted to have findings made. In drawing up the judgment the Government used a stock form, which contained certain recitals; but these were never intended as findings; nor do they comply with the rule of the court regarding findings.

The rule governing findings is as follows (Rule 62):

"In actions at law in which a jury has been waived as provided by the Act of Congress, it shall be in the discretion of the court to make special findings of fact upon the issues raised by the findings. Ordinarily the court will make such findings on request of either party, if such request be made on or before the submission of the cause for decision. Where such request is made and granted, no judgment shall be entered until the findings shall have been signed and filed or waived as hereinafter provided; but the rendition of the decision or opinion shall be deemed and considered, and shall be entered by the clerk, as merely a preliminary order for judgment. The counsel for the losing party shall prepare a draft of the findings, and shall serve such draft upon the opposite party within five days after receiving written notice of the decision, and shall thereupon deliver said draft to the clerk for the Judge, who shall as soon as practicable thereafter designate a time for the settlement of the findings, of which the clerk shall notify the parties. When such draft is presented to the Judge, the successful party may present such amendments or additions to the proposed findings as he may desire, and the whole shall be settled by the Judge.

"When the findings have been settled, they shall be engrossed by the losing party within five days after such settlement, and shall be signed and filed. If the losing party shall fail to serve his draft findings and deliver the same to the clerk as aforesaid within the time above specified, the right to special findings shall be deemed to have been waived, and the judgment may be entered without further proceedings upon the request of any party, or by the clerk without any such request. The periods above specified will not be extended.

> "Special findings may be of the ultimate facts in issue, as distinguished from conclusions of law on the one hand, and mere evidence on the other, and must cover all material issues raised by the pleadings."

This rule clearly contemplates a request for findings. No request can be found in the transcript.

The rule provides for separate findings which are to be "signed and filed" before the judgment is signed.

The *losing party* is to prepare the findings and the court is required to "designate a time for the settlement of the findings." The transcript shows no such proceeding; nor does it show "notice" to the parties of the time for settlement of the findings, as required.

As stated, the rule provides that the findings are to be prepared by the losing party, not the successful party. Further, the rule provides that if the losing party does not prepare findings, they are waived and none should be made.

Moreover, no rule is laid down as to exceptions to findings.

It will be found that in a number of the cases involving appeals on bail bonds, which will be argued at the same time as this case, the judgment recited that it was by default, whereas in fact the record shows that it was after full hearing. In other words, the judgments were prepared by the Government on stock

forms, without any thought of their constituting findings of fact.

We respectfully submit that the judgment should be reversed for the reasons set forth in the opening brief, which reasons are summarized at pp. 41-42 of the opening brief.

Respectfully submitted,

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